United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6187

To be argued by
STUART I. PARKER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6187

SARAH D. BOLLOTIN,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

ROBERT B. FISKE, JR.,
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Preliminary Statement

Plaintiff-Appellant, Sarah D. Bollotin, is a teacher-librarian employed by The Newark, New Jersey Board of Education ("Board of Education"). She appeals to this Court from a final judgment dismissing her action brought under 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422 for a refund of federal income taxes for 1970.

Miss Bollotin instituted this action *pro se* on March 14, 1975 and on June 27, 1975 filed an amended complaint. In October 1975, at District Judge Dudley B. Bonsal's request, the law firm of Kaufman, Taylor, Kimmel & Miller, by its senior partner Stanley L. Kaufman, entered an appearance on Miss Bollotin's behalf. The Government then moved, in November 1975, for judgment on the pleadings, which motion was opposed by the Kaufman

firm. On December 9, 1975, Judge Bonsal denied the Government's motion and on March 22, 1976 a second amended complaint was filed on Miss Bollotin's behalf. Thereafter, a bench trial was held before Judge Bonsal on May 4, 1976 at which Miss Bollotin was the only witness. In a nine-page opinion, filed on August 3, 1976, Judge Bonsal held that Miss Bollotin was not entitled to an income tax refund and ordered that judgment be entered for the United States. The final judgment dismissing Miss Bollotin's second amended complaint with prejudice was entered on October 22, 1976. Miss Bollotin is prosecuting this appeal *pro se*.

Issue Presented

1. Did Judge Bonsal err in holding after hearing Miss Bollotin's testimony at trial that she failed to prove her entitlement to a tax refund?

Facts

In her 1970 federal income tax return, Miss Bollotin claimed $1,058 as a "Retirement income credit" (A-18).* She alleged at trial that this amount had been deducted from her salary during 1968, 1969 and 1970 and credited to her account with the Supplemental Annuity Collective Trust of New Jersey ("SACT") (A-30).

SACT is a voluntary New Jersey state retirement plan to which teachers, among others, may elect to contribute up to 10% of their salaries for the purchase of annuities

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* Unless otherwise indicated, references are to pages in the Appendix.

to supplement other retirement plans. N.J.S.A. 52: 18A-107 *et seq.* As Judge Bonsal explained at page 4 of his opinion (A-6):

> There are two methods by which a teacher may participate in the SACT program: He or she may pay or authorize the employer to pay an agreed percentage of his or her salary directly to SACT (*see* N.J.S.A. 52:18A-113 (West 1968)) ("Method A"); or the teacher may "enter into an agreement with [the] employer whereby the [teacher] agrees to a reduction in salary in return for [the] employer's agreement to use the amount of such reduction in salary to purchase on behalf of such [teacher] from [SACT] an annuity, provided that any such annuity qualifies under section 403(b) of the Internal Revenue Code of 1954, as amended." N.J.S.A. 52:18A-113.1 (West 1968) (footnote omitted). The New Jersey statute further provides that "[a]ny such agreement shall remain in effect for at least 1 year." *Id.* ("Method B").

The evidence at trial indicates that through 1970, the tax year at issue in this action, Miss Bollotin's participation in SACT was pursuant to Method A. Judge Bonsal found:

> On November 19, 1966, plaintiff signed a SACT "Enrollment Application" whereby she "authorized payroll deductions of 5% . . . to purchase a SUPPLEMENTAL VARIABLE ANNUITY." Plaintiff testified that in December, 1968, Mr. Aaron Beckerman, the bookkeeper in the Payroll Department of the Board of Education gave plaintiff a copy of the SACT Enrollment Application form for the "Tax Sheltered Annuity Program", and a copy of the applicable New Jersey SACT Administrative Rules; but she did not fill out the forms

> at that time. On March 8, 1971, plaintiff signed a SACT Enrollment Application authorizing "the purchase of a Variable Annuity in the Tax Sheltered Program of the [SACT]", and indicated that she agreed to a 10% salary reduction. On March 9, 1971, plaintiff signed a SACT "Salary Reduction Agreement' . . . . (A-4, 5).

Although Miss Bollotin admitted that prior to March 8, 1971 she never filled out an application form and salary reduction agreement for the SACT "Tax Sheltered Annuity Program" (A-50, 51), she nevertheless maintained that it was her intention and belief that her SACT contributions for 1968 through 1970 would not be taxed until they were received by her as annuity payments (A-37, 38). Judge Bonsal concluded, however, that because her SACT contributions were made out of funds already owed to her as salary (Method A), and not by the Board of Education pursuant to a salary reduction agreement (Method B), the contributions were properly treated as part of her taxable income (A-10, 11). Accordingly, he held that the Internal Revenue Service was correct in denying Miss Bollotin's claim for an income tax refund for 1970 based on the contention that her 1968 through 1970 SACT contributions were somehow tax sheltered.

Relevant Statutes

Section 403(b) of the Internal Revenue Code provides in pertinent part:

> (b) Taxability of beneficiary under annuity purchase by . . . public school.—
>
> (1) General Rule.—If—
>
> (A) an annuity contract is purchased—
>
> . . . . .

> (ii) for an employee . . . who performs services for an educational institution . . . by an employer [such as the Board of Education],
>
> . . . . .
>
> (C) [and, if] the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums,
>
> then amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amount does not exceed the exclusion allowance for such taxable year. The employee shall include in his gross income the amounts received under such contract for the year received as provided in section 72 (relating to annuities).

Section 52:18A-107 of the New Jersey Statutes Annotated provides:

> Purpose of act
>
> The purpose of this act is to enable active members of the several State administered retirement systems to make voluntary additional contributions to provide annuities to supplement their retirement allowances provided by such systems.

Section 52:18A-109 of the New Jersey Statutes Annotated provides:

Supplementary annuity program; establishment; contributions

Each State administered retirement system shall establish, as a part thereof, a supplementary annuity program under which it will receive voluntary contributions from its members, which shall be in addition to any contributions required of them by that retirement system, for the purpose of providing annuities to supplement their retirement allowances. Each such State administered retirement system shall, upon receipt of such contributions, place the same in the Supplemental Annuity Collective Trust, hereinafter described.

Section 52:18A-110 of the New Jersey Statutes Annotated provides:

Supplemental annuity collective trust; establishment; duties; divisions

There is hereby established in the Department of the Treasury the Supplemental Annuity Collective Trust of New Jersey, which shall accept amounts received for supplemental annuities from the State administered retirement systems and combine the same for purposes of this act. The Supplemental Annuity Collective Trust shall also accept amounts paid by employers for the purchase of annuities on behalf of employees as hereinafter provided. The funds paid by employers to purchase annuities for their employees shall be accounted for separately from other funds received by the Supplemental Annuity Collective Trust. The Supplemental Annuity Collective Trust hereby established shall consist of a Variable Division and a Fixed Division.

Section 52:18A-113 of the New Jersey Statutes Annotated provides:

> Contributions
>
> Contributions by a participant shall be made through payroll deductions of integral dollar amounts not in excess of 10% of the participant's salary. Participants who are making contributions through payroll deductions may also make lump-sum contributions by direct payments in integral dollar amounts of not less than $50.00, provided, however, that the total contributions for any 1 year may not exceed 10% of the participant's annual salary.
>
> Contributions by a participant shall cease upon retirement, death, or upon termination of membership in a State administered retirement system.

Section 52:18A-131.1 of the New Jersey Statutes Annotated provides:

> Contracts by employer to purchase annuities on behalf of employee
>
> Any employee who is a member of a State administered retirement system may enter into an agreement with his employer whereby the employee agrees to a reduction in salary in return for his employer's agreement to use the amount of such reduction in salary to purchase on behalf of such employee from the Supplemental Annuity Collective Trust of New Jersey an annuity, provided that any such annuity qualifies under section 403(b) of the Internal Revenue Code of 1954, as amended.* [Footnote omitted]. The amount of the reduction in salary under any agreement entered into between an employee and his employer pursuant to this

section shall not exceed 10% of the employee's salary prior to such reduction. Any such agreement shall remain in effect for at least 1 year. If an agreement is entered into between an employee and his employer pursuant to this section, the employer shall pay the premiums for the annuity purchased directly to the Supplemental Annuity Collective Trust in accordance with rules and regulations promulgated by the council.

Relevant Regulation

26 C.F.R. § 403(b)-1(b)(3)(i) provides:

(3) *Agreement to take a reduction in salary or to forego an increase in salary.* (i) There is no requirement that the purchase of an annuity contract for an employee must be merely a "suplement to past or current compensation" in order for the exclusion provided by this paragraph to apply to employer contributions for such annuity contract. Thus, the exclusion provided by this paragraph is applicable to amounts contributed by an employer for an annuity contract as a result of an agreement with an employee to take a reduction in salary, or to forego an increase in salary, but only to the extent such amounts are earned by the employee after the agreement becomes effective. Such an agreement must be legally binding and irrevocable with respect to amounts earned while the agreement is in effect. The employee must not be permitted to make more than one agreement with the same employer during any taxable year of such employee beginning after December 31, 1963; the exclusion provided by this paragraph shall not apply to any amounts which are con-

tributed under any further agreement made by such employee during the same taxable year beginning after such date. However, the employee may be permitted to terminate the entire agreement with respect to amounts not yet earned.

ARGUMENT

The District Court did not err in dismissing Miss Bellotin's action for a refund of income taxes.

As Judge Bonsal's opinion states:

> Contributions to an annuity plan or other retirement fund paid either by the employee-taxpayer or by the taxpayer's employer out of the employee-taxpayer's salary constitute gross income (*see Hogan* v. *United States*, 513 F.2d 170 (6th Cir. 1975), *aff'g* 367 F. Supp. 1022 (E.D. Mich. 1973); *Ward* v. *Commissioner*, 159 F.2d 502 (2d Cir. 1947)), and are taxable in the year the contributions are made. *See* 1976 CCH ¶ 2638.B01 at 32,396, and ¶ 2638B.03 at 32,403. However, § 403(b) of the [Internal Revenue] Code creates an exception to this general rule and permits, under certain circumstances, an employee to defer payment of income taxes on contributions to an annuity plan (such as SACT) until the annuity benefits are paid. (A-6, 7).
>
> * * * * *
>
> [U]nder § 403 and the applicable regulations, in order to qualify for the deferred tax treatment, it must be the employer, rather than the employee, who contributes to the annuity plan. One method by which this requirement can be satisfied is that the employee, and employer enter into a binding

> agreement that the employee will take a reduction in salary and that the employer will pay the difference into an annuity plan on the employee's account. *See id.*; N.J.S.A. 52:18A-113.01 (West 1968). Such an agreement must be prospective in application. *See* 1976 CCH ¶ 2637, at 32,380, and ¶ 2638B.03 at 32,403 (A-8).

Judge Bonsal denied Miss Bollotin's refund claim because her SACT contributions for 1968 through 1970 were not made by her employer, the Board of Education, as required under 26 U.S.C. § 403(b). In this connection Judge Bonsal said:

> Plaintiff, who has the burden of proof, has not shown that the Board of Education purchased the SACT annuities for her out of funds it did not already owe her as salary. Plaintiff's 1970 "Statement of Earnings and Deductions" and her 1970 tax return indicate that her salary was approximately $9400 and that she had authorized the Board of Education to make contributions to SACT out of this salary, after it was constructively paid to her. *See Llewellyn* v. *Commissioner*, 295 F.2d 649, 651 (7th Cir. 1961). Moreover, there was no evidence that plaintiff entered into a "binding and irrevocable" agreement with the Board of Education to reduce her salary (or to forego a salary increase) prior to the time the 1968-70 SACT contributions were made. *See Zeltzerman* v. *Commissioner*, *supra* [34 T.C. 73] at 82-83. Indeed, there has been no showing that there was any change during 1968 or thereafter (until 1971) in the procedure established as a result of plaintiff's 1966 Enrollment Application, which authorized contributions by Method A. (A-10) (Footnote omitted).

In summary, Miss Bollotin's action was dismissed because she offered no proof that her 1968, 1969 and 1970 SACT contributions qualified for deferred tax treatment under 26 U.S.C. § 403(b). Indeed, all of the evidence at trial, including Miss Bollotin's testimony, indicates that the requirements of Section 403(b) were not met.

CONCLUSION

The judgment appealed from, dismissing the second amended complaint, should be affirmed.

Dated: New York, New York
April 7, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

CA 76-6187

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 8th day of April 1977 she served two copies of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Sarah D. Bollotin
200 West 16th Street
New York, New York 10011

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

8th day of April, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978